No. 11 Orig.

Office Supreme Court, U.
FILED.
JUN 14 1913
JAMES H. McKENN
Cl.

Supreme Court of the United States

OCTOBER TERM, 1912

IN RE CITY OF LOUISVILLE, KENTUCKY, PETITIONER

BRIEF ON MOTION TO FILE PETITION FOR MANDAMUS

PENDLETON BECKLEY,
Attorney for Petitioner.

J. W. S. CLEMENTS,
STUART CHEVALIER,
Of Counsel.

THE STANDARD PRINTING CO., INCORPORATED, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1912

IN RE CITY OF LOUISVILLE, KENTUCKY, . . *Petitioner.*

BRIEF ON MOTION TO FILE PETITION FOR MANDAMUS.

May It Please the Court:

On the motion to file the petition herein, we respectfully submit the following brief suggestions:

The only question raised by this petition is as to whether the Judge of the District Court has misconstrued the opinion of this Court as reported in the case of Louisville vs. the Cumberland Telephone and Telegraph Company, 225 U. S., 430.

The one issue made on the Bill of Complaint filed in that case in March, 1909, was as to whether the ordinance of March 6, 1909, was confiscatory as to the telephone company.

By referring to the Bill of Complaint (page 14 of Record No. 197, October Term, 1911), it will be found that the complainant charged that the ordinance was

confiscatory as to it as of the 6th day of March, 1909. The answer put this allegation in issue and on final hearing, the lower court upheld the contention of the complainant and perpetually enjoined the defendant from enforcing the rate ordinance in question. This court by its opinion reversed the decree of the lower court. In so reversing that decree, Your Honors adhered to the opinions handed down in the Knoxville Water Company case and the Consolidated Gas Company case.

The opinion in the Louisville case is very short. It reviewed the facts briefly and wound up with this laconic sentence: "Decree reversed without prejudice."

When the case came back to the lower court, the city on September 28, 1912, moved the court for an order requiring the telephone company to make restitution to its patrons of all sums which had been collected by it in excess of the ordinance rates, and for the appointment of a Master to ascertain the amount so unlawfully collected and the names of the persons who were entitled to restitution. This motion was sustained, and the order of reference copied in the petition herein on page 5 is the order which was accordingly entered. No further step of any kind was taken in the case until sometime in February, 1913, when the Judge of the District Court notified counsel that he intended to enter an order appointing a Master to ascertain whether the telephone company was operating under the ordinance rates, and whether it was or was not earning sufficient money under

those rates to justify the Court in saying that those rates were not confiscatory as to the telephone company. The city, through its counsel, objected vigorously to the appointment of any such Master or to any such investigation being made, contending that this particular case was at an end insofar as the charge of confiscation was concerned. The lower court disregarded the objection of the city, and of its own motion, entered the order of reference which is copied on page 8 of the petition.

The Court was not requested by the telephone company or by any party to make any such order and in the opinion filed at the time the order was made, the Court stated that as it construed the opinion of this Court in 225 U. S., that opinion directed the District Court to make the inquiry which the order of reference then made called for.

The order entered by the District Court is clearly the result of a misinterpretation of the opinion of this court; and, such being the case, your petitioner is entitled to an order commanding the Judge of that court to refrain from proceeding further under such misinterpretation.

That the Judge of the District Court has misconstrued the opinion of this Court, as reported in 225 U. S., is shown not only by referring to the opinion itself, but by a reference to other opinions of this court wherein the same principle of law was announced.

Take for instance the Knoxville Water Company case, 212 U. S., page 18. That was a case wherein the

principle of law was first laid down that the courts should not declare a rate ordinance confiscatory until the public service corporation had given it a fair trial. In concluding the opinion in that case this Court said:

> "If hereafter it shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent *another application to the Courts of the United States or to the Courts of the State of Tennessee.*"

Accordingly the decree was reversed, the following language being used by the Court:

> "The decree is reversed and the case remanded to the Court below with directions to dismiss the bill without prejudice."

In Willcox vs. Consolidated Gas Company, 212 U. S., 19, the same principle of law was announced, this Court using the following language:

> "It may possibly be, however, that a practical experience of the effect of the Acts by actual operation under them might prevent the complainant from obtaining a fair return as already described, and in that event, complainant ought to have the *opportunity of again presenting its case to the Court.* To that end, we reverse the decree, with directions to dismiss the bill without prejudice, and *it is so ordered.*"

In the Louisville case, the principle laid down in the Knoxville Water Company case and the Consolidated

Gas Company case was followed in a very brief opinion which wound up as follows:

> "The whole question is too much in the air for us to feel authorized to let the injunction stand. Decree reversed without prejudice."

It is the contention of the City of Louisville that by the opinions in these three cases this Court meant identically the same thing; that is to say, inasmuch as the complainants had not shown by clear and unmistakable proof that the rates in question would be confiscatory, the Court would not affirm decrees enjoining the enforcement of such rates until the public service corporation had put the rates into effect, and given them a fair trial. In the meantime, it was clearly the purpose and intention of this Court in writing those three opinions that the decrees of the lower court should be reversed, and the cases dismissed insofar as the question of confiscation was concerned; but if any one of those three public service corporations saw fit in the future, and after testing the rates, to again try out the question of whether the ordinance was or was not confiscatory, its right to do so should not be prejudiced by anything contained in the opinions of this Court or the decrees entered pursuant thereto.

The principle of law on which these three cases were decided has been involved in only one other case. We refer to the case of the Northern Pacific Railway Com-

pany vs. North Dakota, 216 U. S., 579. That was a case in which the Attorney-General of North Dakota brought suit against the Northern Pacific Railway Company seeking a mandatory injunction to compel the railway company to put into effect certain railroad rates fixed by the State of North Dakota. The lower court granted the mandatory injunction. The Northern Pacific appealed from that decree to this Court. This Court affirmed the lower court on the theory that the Northern Pacific, having never tried out the rates fixed by the State of North Dakota, was not in a position to show the Court that the rates were clearly confiscatory. In affirming the judgment of the lower court, this Court said:

> "It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Wilcox vs. The Consolidated Gas Company, 212 U. S., 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal. *Decree affirmed without prejudice.*"

In the Northern Pacific case the facts arose in a different manner from that in which they arose in any of the other three cases. In that case the railroad disregarded the law and the State sought to have the courts compel it to obey the law. The lower court entered a

decree commanding the railroad company to put into effect the rates in question. Had this Court affirmed that decree with nothing more, the railroad company would have been forever enjoined from seeking to have those rates declared confiscatory inasmuch as the decree would have been final and would have been *res adjudicata* as between the parties. There was no way whereby this Court could affirm the decree of the lower court and permit the railroad company to question the legality of the rates, except by directing the District Court to retain the case on the docket for a reasonable length of time in order to permit the railroad company to come into that case and test the legality of those rates.

But even in the Northern Pacific case, the Court did not direct the District Court to appoint its Master to enforce the rates or on its own motion to ascertain how much the railroad company was earning under those rates. It simply directed the lower court not to dismiss the bill for a reasonable length of time in order to give the railroad company an opportunity to file another petition in the case if, after operating under those rates, it thought it could show conclusively that the rates were confiscatory.

In the case at bar, the District Judge, not content to let the parties practice their own case, not content to wait until the telephone company had tried out the rates and had again presented a petition charging that the rates were confiscatory as shown by an actual test of

them, not content to wait until some party to the litigation asked for the appointment of a Master to examine into and report on the question of whether the telephone company had or had not earned money from operating its plant with the rates in force; of his own motion brought in an opinion wherein he stated that from reading the opinion of this Court he had reached the conclusion that this Court had directed him to supervise the operations of the telephone plant, to enforce an ordinance of the City of Louisville, to determine whether the rates fixed in that ordinance were or were not fair to the telephone company, and to determine how much money the telephone company had expended in operating its plant and what were its gross and net earnings.

The terms of the order of reference itself show that the position of the District Judge is absolutely untenable. For instance in the first order of reference (see Petition, page 5), the Court directed the Master to ascertain the amount collected by the telephone company from the patrons in excess of the ordinance rates "between the time the temporary injunction *pendente lite* went into effect, viz., on March 8, 1909, and July 1, 1912, *at which latter date counsel agree that the ordinance rates were put into effect by the complainant.*"

In the second order of reference (see Petition, page 9), the Master is directed to ascertain and report: "(a) Whether on or about July 1, 1912, or at any other later date, the complainant put into operation the rates for

telephone service in the City of Louisville prescribed by said city in the ordinance approved March 6, 1909."

In other words, in the first order, the court recites the fact that the parties have agreed that the ordinance rates went into effect on July 1, 1912, and yet subsequently appoints a Master to ascertain whether those rates actually did go into effect on that date.

It was no concern of the Judge of the District Court whether the rates had or had not gone into effect, unless some party to the litigation, by motion or rule, presented the matter to him for action.

No party to the litigation complained that the ordinance rates were not in effect; and even if complaint had been made by the city, it would not have been within the province of the District Court to enforce that ordinance. By virtue of the ordinance itself a penalty was provided for its violation. If the city had asked the District Court for a rule compelling the telephone company to put into effect the rates that Court should have overruled such motion and have referred the city to its Ordinance Court to enforce the terms of the ordinance.

Again, in the present status of the case, what concern is it of the District Court as to what are the gross and net earnings of the telephone company from its property in the City of Louisville?

If the telephone company desires to again question those rates, undoubtedly it can file another bill of complaint in the District Court or it may elect to file its bill

in the State Court. In any event the telephone company will necessarily be the moving party. In such a case it can present the evidence on which the Court is asked to act in reaching a conclusion as to whether or not those rates are then confiscatory. In such a proceeding the city will have an opportunity to examine the records, cross-examine witnesses and itself produce proof. But in the proceedings which the District Judge has instituted, the Master is simply to supervise the operations of the telephone plant and to report to the Court what the telephone company has earned under the rate ordinance, and on this report the District Court will enter its decree. Such a proceeding, we submit, is unheard of in the history of rate legislation, and especially objectionable when the Master so appointed is the Clerk of the District Court, disqualified from acting, and appointed over the protest of the city whose ordinance is being questioned.

What would Your Honors say of a District Judge who would entertain jurisdiction of a cause in which a public service corporation alleged that it was ignorant of whether certain rates fixed by a legislative body were confiscatory as to it, that it had put the rates into effect and it now filed its bill of complaint for the purpose of having the Court appoint a Master to see if those rates were really in effect, to supervise the operations of the company, and to report to the Court the gross earnings.

gross expenses and net revenues of the company; and asked the Court to determine from such a report whether the rates were or were not confiscatory?

We apprehend that a District Court would refuse to act under such circumstances. It would properly say:

> "We have nothing to do with operating your plant or with your earnings or expenses. We have no jurisdiction of a cause such as the one you present except where it is charged that the rates are confiscatory. When you have tested the rates and are prepared to show the Court conclusively that your property is being confiscated then will be the time for you to file your bill. Then and not until then will the Court entertain jurisdiction of such a cause."

For the Court to hold otherwise would be to place an undue burden not only on the defendant but on the Court. It would be extending the province of a Chancery Court far beyond the established rules of equity.

And yet Judge Evans not only did all these things, but he did them in a cause which this Court had in effect directed him to dismiss—a cause moreover wherein the public service corporation did not even request such supervision.

For these reasons we respectfully submit that the motion to file the petition should be sustained, the petition filed, and the rule awarded.

Respectfully submitted,

PENDLETON BECKLEY,

Attorney for Petitioner.

J. W. S. CLEMENTS,
STUART CHEVALIER,

Of Counsel.

Office Supreme Court,
FILED.
OCT 14 1913
JAMES H. McKEN

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 11, Original.

IN RE CITY OF LOUISVILLE, KENTUCKY, *Petitioner.*

MOTION TO FILE EXHIBITS.

Comes the petitioner, City of Louisville, Kentucky, and tenders herewith copies of certain pleadings and papers which have been filed since this proceeding was instituted, and which have become a part of the record in the case of Cumberland Telephone & Telegraph Company v. City of Louisville, referred to in the petition, and which are pertinent on the hearing of the motion for the writ of mandamus; and moves the Court for an order filing said exhibits as a part of the petition.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Attorneys for City of Louisville, Kentucky, Petitioner.

Office Supreme Court,
FILED.
OCT 14 1913

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 11, Original.

IN RE CITY OF LOUISVILLE, KENTUCKY, *Petitioner.*

NOTICE.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky—Sir:

You are notified that the petitioner in the above styled cause will on October 13, 1913, or on the day following when motions are called for in said Court, move the said Court for an order allowing it to file as exhibits with the petition certain pleadings and papers in the case of Cumberland Telephone & Telegraph Company v. City of Louisville, referred to in said petition and which have become a part of the record in said case since the above proceeding was instituted.

PENDLETON BECKLEY,
J. W. S. CLEMENTS,
STUART CHEVALIER,
Attorneys for the City of Louisville, Kentucky, Petitioner.

Notice accepted:

HUNT CHIPLEY,
WM. L. GRANBERY,
ALEXR. POPE HUMPHREY,
For Respondent.